Supreme Court, U.S.
FILED
FEB 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-990

In the Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN POSTAL WORKERS UNION, AFL-CIO, NEW LONDON CONNECTICUT AREA LOCAL, ET AL., PETITIONERS

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners seek to reinstate a preliminary injunction barring the Postal Service from placing an employee on non-pay status pending arbitration proceedings concerning the Postal Service's decision to discipline him, even though the employee has served the two-week suspension imposed by the Postal Service.

1. a. This dispute arose from a Postal Service decision to eliminate 14 positions at the New London, Connecticut, Post Office (Pet. App. 3a). Petitioners publicized their disagreement with this action by writing to elected officials and contacting local newspapers (*ibid.*), actions that are not the subject of any disciplinary action. Petitioners, however, also sent a letter, signed by petitioner Danko, the president of the local union, to one of the Postal Service's most

important local customers, Mystic Color Labs. The letter stated: "The purpose of this letter is to make you aware of the fact that large amounts of your film mailers are not being processed for outgoing dispatch or incoming delivery. This situation has been going on for some time now. Postal management will not make you aware of this, in fact they would most likely deny it if questioned about it." *Id.* at 3a-4a. The letter blamed the delays on the elimination of the 14 positions (*id.* at 4a). After an investigation, the Postal Service proposed to dismiss petitioner Danko on the ground that mailing this letter to a customer violated Danko's duty to avoid actions that adversely affect public confidence in the Postal Service (*ibid.*).

Petitioner Danko filed a grievance and requested arbitration pursuant to the Postal Workers' collective bargaining agreement (Pet. App. 6a). Under the collective bargaining agreement, invocation of the grievance procedures prevented the Postal Service from dismissing Danko, but placed him in nonpay, nonduty status pending resolution of his claims (*id.* at 5a).

b. On July 23, 1984, petitioners brought this suit in the United States District Court for the District of Connecticut, seeking a preliminary injunction barring the Postal Service from placing Danko on nonpay status pending the results of the arbitration process (Pet. App. 6a). The district court concluded, under *Sampson* v. *Murray*, 415 U.S. 61 (1974), that Danko's financial difficulties were not sufficient to establish the irreparable injury required to obtain an injunction (Pet. App. 20a). The court concluded, however, that Danko's letter concerned a matter of public concern and that it was therefore protected by the First Amendment (*id.* at 22a). Based on that conclusion, the court held that "the failure to enjoin Danko's discharge would result in a chilling of his and the other employees' exercise of their first amendment rights; thus the plaintiffs have satisfied the

irreparable harm requirement" (*id.* at 23a), and that "plaintiffs have shown a likelihood of success on their claim that Danko's discharge was unlawful" (*id.* at 24a). Finally, noting that injunctions should be issued pending arbitration only if the failure to issue an injunction would deprive the plaintiffs of an effective remedy if they prevailed at arbitration, the court concluded that "the failure to issue an injunction would frustrate the arbitration process because the arbitrator would be unable to remedy the chilling effect on the employees' exercise of their first amendment rights" (*id.* at 25a).

The court of appeals reversed (Pet. App. 1a-15a). While finding the letter to the Postal Service's customer "at least in part, about a matter of public concern," the court of appeals held that petitioners had failed to articulate a " 'specific present objective harm or a threat of specific future harm' " (*id.* at 12a, quoting *Laird* v. *Tatum*, 408 U.S. 1, 13-14 (1972)). Rather, the court of appeals found, the plaintiffs "merely make the conclusory assertion that Danko's discharge has 'chilled the will of the postal workers in Connecticut, and their elected officials' " (Pet. App. 13a). Moreover, the court concluded, "we fail to understand how a chilling of the right to speak or associate could logically be thawed by the entry of an interim injunction, since the theoretical chilling of protected speech and union activities stems not from the interim discharge, but from the threat of permanent discharge, which is not vitiated by an interim injunction" (*ibid.*). Finally, the court determined that, rather than aiding the arbitration process, the injunction requiring "the Postal Service to keep Danko on the job during the interim period would frustrate that provision of the collective bargaining agreement that specifically authorizes placing an employee on nonpay status pending the outcome of a grievance and arbitration proceeding" (*id.* at 15a).

c. After the court of appeals' decision, the Postal Service unilaterally reduced Danko's punishment to a two-week suspension (Pet. 9).[1] Petitioners did not seek a stay of the court of appeals' mandate pending their petition to this Court for further review, and the Postal Service has advised us that Danko's two-week suspension was served in November 1985. The arbitration hearing was concluded on January 22, 1986.

2. Further review is not warranted. Because petitioner Danko has served his suspension and the arbitration process has now substantially advanced, this controversy will almost certainly become moot before it could be adjudicated by this Court, if it is not already moot. In any event, the court of appeals' decision is based upon, and is fully consistent with, this Court's guidelines for protecting the First Amendment rights of public employees and, contrary to petitioners' claims, does not conflict with the decisions of any other court of appeals.

a. Since the Postal Service reduced petitioner Danko's punishment to a suspension, which he has already served, the issue before the lower courts—whether to issue a preliminary injunction barring the Postal Service from placing petitioner Danko on nonpay status pending arbitration—is no longer in controversy. It is not at all clear what relief petitioners seek at this point.[2] Furthermore, the arbitration

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[1]There is absolutely no support for petitioners' suggestion (Pet. 19) that the Postal Service's reduction of petitioner Danko's sanction was deliberately withheld until the court of appeals' decision.

[2]Petitioners argue (Pet. 15-16) that what matters "is whether the terminated employee is on the job and and thus able to pay his bills or off the job without such an ability while some tribunal wrestles with the legal niceties of the dispute." No injunction is now needed to put petitioner Danko "on the job" or prevent the Postal Service from removing him from his job.

Petitioners suggest without explanation (Pet. 19) that they are entitled to declaratory relief and that further court proceedings are

hearing has concluded. We are informed that, ordinarily, arbitration decisions are rendered within 60 days after the hearing is closed and that this dispute does not involve unusual circumstances likely to cause delay. After the arbitrator's decision, in the event petitioners remain aggrieved, the dispute would present substantially different legal questions. See, *e.g.*, *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 596-599 (1960).

Petitioners argue that this case is not moot because there is " ' "a reasonable expectation that the *same complaining party* [will] be subjected to the same action again" ' " since they may write more letters to Postal Service customers (Pet. 21 (emphasis in original), quoting *SEC* v. *Sloan*, 436 U.S. 103, 109 (1978), and *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975)). However, the arbitrator will soon determine petitioners' rights under their collective bargaining agreement with the Postal Service, and, after the arbitration decision is rendered, the propriety of writing letters to Postal Service customers and of disciplining employees who take such action should be clear. It is difficult to see what benefit there is to any party in continuing to litigate this preliminary injunction action.

b. Moreover, the court of appeals' decision is correct. While public employees do not sacrifice their rights as citizens to speak upon matters of public concern, protection of these rights need not cause "intrusive oversight by the judiciary in the name of the First Amendment." *Connick* v. *Myers*, 461 U.S. 138, 146 (1983). Here the punishment was based solely upon a letter directed to the Postal Service's customer attributing alleged delays of that customer's mail

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warranted to consider that issue. It is clear, however, that such relief would be inappropriate since it would conflict with the arbitration process.

to the managerial decision to cut back the work force at a particular post office. Even assuming arguendo that this kind of managerial decision rises to the level of a public concern, as the court of appeals somewhat reluctantly concluded (Pet. App. 12a), the court of appeals was certainly correct in rejecting petitioners' vague "chilling argument," which amounted to little more than a conclusory assertion. A preliminary injunction barring discharge of a government employee should be issued only "in the genuinely extraordinary situation." *Sampson* v. *Murray*, 415 U.S. 61, 92 n.68 (1974). Lest the government be precluded from ever taking interim disciplinary steps against its employees, public employees must articulate specific injuries to set forth a claim based on chilling of First Amendment rights. See *Laird* v. *Tatum*, 408 U.S. 1, 13-14 (1972). Finally, the strong policy against premature judicial intervention in labor disputes, especially where the parties have agreed to binding arbitration, strongly militates against the issuance of the injunction. See, *e.g.*, *Buffalo Forge Co.* v. *United Steelworkers*, 428 U.S. 397 (1976); *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960).

c. Contrary to petitioners' claim (Pet. 10-14), there is no conflict in the circuits. In *Johnson* v. *Bergland*, 586 F.2d 993, 995 (4th Cir. 1978), the court found irreparable injury in part because "without the injunction, the government would be free to name a successor to Johnson * * *, and Johnson would have no means of being reinstated if he should prevail at trial." That is not the case here.[3] The other case petitioners cite, *Purolator Armored, Inc.* v. *NLRB*,

[3] The court in *Johnson* also said that "[v]iolations of first amendment rights constitute per se irreparable injury" (586 F.2d at 995). Whatever the merits of that proposition, the court of appeals here did not disagree with it, concluding instead that petitioners had failed to articulate a First Amendment violation (Pet. App. 12a-13a).

764 F.2d 1423 (11th Cir. 1985), did not involve a preliminary injunction or a First Amendment claim, and is obviously not in conflict with the Second Circuit's decision in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1986

DOJ-1986-02